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No. 02-855

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION

On November 26, 2002, petitioner George M. Galaza, Warden of the State Prison at Corcoran, California, filed a Petition for a Writ of Certiorari ("Pet."), to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Avila v. Galaza*, 297 F.3d 911 (2002). On February 10, 2003, respondent Jesus Avila filed his Brief in Opposition (Opp.). The Warden respectfully submits this reply.

INTERVENING PROCEDURAL EVENTS MIGHT HAVE MADE THIS CASE MOOT; IF SO, THE WARDEN REQUESTS VACATUR OF THE LOWER FEDERAL COURT PROCEEDINGS

In granting the petition for writ of habeas corpus, the Ninth Circuit ordered the State to retry Avila within sixty days or release him. (Pet. at 5.) The sixtieth day was January 6, 2003. (Pet. at 5.) Avila, however, agreed to a delay to and including March 17, 2003.

On February 21, 2003, the Los Angeles County District Attorney entered an agreement with Avila pursuant to which Avila pleaded guilty to attempted murder and admitted the weapons-use allegations as charged in the original accusatory pleading. The plea provides for Avila's release with credit for time served. Counsel for the Warden was informed of the plea on February 24.

The Warden advises the Court of the foregoing in accordance with his "duty . . . to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997), *quoting Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam). It is, however, the Warden's position that entry of the plea does *not* make the current case moot inasmuch as Avila's plea constitutes an official adoption of the existing conviction as to which collateral legal consequences attach. *Sibron v. New York*, 392 U.S. 40, 55 (1968) (it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences"). Nonetheless, if the Court should find the matter moot, the Warden would ask for the equitable remedy of vacatur.

The "leading case" on vacatur is *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 22 (1994). In *Munsingwear*, the government filed an action seeking injunctive relief and treble damages against the respondent for failing to comply with pricing regulations. The district court considered the injunctive action first and determined that the respondent's prices complied with regulations. While the government's appeal from that decision was pending, the commodity at issue was deregulated. The respondent moved to dismiss the appeal as moot, and the court of appeals granted that motion. The respondent then returned to the district court and sought dismissal of the treble damages portion of the complaint, arguing that the district court's unreversed decision denying injunctive relief was res judicata

as to the remainder of the government's complaint. The district court agreed and granted the motion. The court of appeal affirmed. *Id.* at 37. On certiorari, this Court considered the government's request for vacatur of the lower courts' decisions. After noting that its "established practice" in dealing with civil cases that become moot while pending certiorari or a decision on the merits "is to reverse or vacate the judgment below and remand with a direction to dismiss," the Court declined to grant the government's request. *Id.* at 39. As the Court explained, the government had "slept on its rights" and was therefore not entitled to the remedy of vacatur in that case. *Id.* at 40-41.

Although the Court denied relief in *Munsingwear*, that case served as the basis for vacatur many times in the ensuing years. *See, e.g., Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (decision of court of appeals vacated and matter remanded for dismissal following settlement of underlying causes of action); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam) (where mootness was clear, decision of court of appeals ordered vacated and case remanded with instructions to vacate district court judgment and remand for dismissal of complaint). However, in *U.S. Bancorp*, 513 U.S. 18, the Court characterized *Munsingwear*'s professed "established practice" as overly broad dictum and found it inapplicable where mootness resulted from the parties' settlement of the case.

At issue in *U.S. Bancorp* was the petitioner's request that the lower court proceedings be vacated following the parties' negotiated settlement. 513 U.S. at 23. The Court distinguished between mootness caused by "happenstance," as in *Munsingwear*, or the unilateral action of the party who prevailed below, and mootness resulting from the parties' settlement of the matter. The Court determined that in the former situations, the party seeking review of an adverse decision is frustrated by the vagaries of circumstance and forced to acquiesce in the judgment. Consequently, in such instances, *Munsingwear*'s "established practice" of vacating the judgment below and remanding with directions to dismiss makes sense. *Id.* at 25 n.3.

In the latter situation, however, the losing party has voluntarily forfeited his right to appeal or petition for writ of certiorari and surrendered his claim to the equitable remedy of vacatur unless he can demonstrate that exceptional circumstances support its application. *Id.* at 25, 29. Whether exceptional circumstances warranting vacatur exist must be determined in light of the public interest because, as the Court explained, "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* at 26, *quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting).

The Warden acknowledges that the settlement between Avila and the Los Angeles County District Attorney moves this case beyond the parameters of *Munsingwear*'s "established practice" and into the realm of *U.S. Bancorp*'s "exceptional circumstances" test. That test, however, has been met. As explained in the certiorari petition (Pet. at 5), and acknowledged by Avila in his opposition (Opp. at 8), the Ninth Circuit granted habeas corpus relief on alternate grounds. First, that the state court's decision was automatically "contrary to" federal law pursuant to 28 U.S.C. § 2254(d)(1) because it did not cite or apply this Court's precedent. (Pet. at 5.) Second, that the state referee's factual findings were "clearly erroneous" within the meaning of 28 U.S.C. § 2254(e)(1) such that the Ninth Circuit was left with a "firm conviction" that the state court's determination was wrong and the one Avila urged was correct. (Pet. at 5.) The first ground was *proved* to be "in error" by this Court's subsequent decision in *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 365 (2002). (Pet. at 13.) And the second ground, inasmuch as it is implicitly based on a belief in Avila's asserted innocence, is equally "in error" given his recent acknowledgment of guilt. These errors effectively rebut the presumption of correctness that would normally attach to the Ninth Circuit's decision herein and demonstrate that the public interest would be best served by its vacatur.

CONCLUSION

For the reasons set forth in the petition, the Warden respectfully asks the Court to issue a writ of certiorari so that the merits of this case may be addressed. Alternatively, for the reasons set forth in this reply, the Warden asks the Court to issue a writ of certiorari, vacate the decisions of the lower federal courts and remand with directions to dismiss the petition for writ of habeas corpus.

February 25, 2003

Respectfully submitted,

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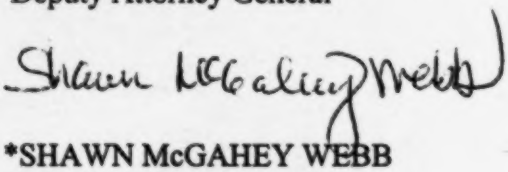

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